No. 85-1695

(14)

In the Supreme Court of the United States

OCTOBER TERM, 1986

SOCIETE NATIONALE INDUSTRIELLE AEROSPATIALE AND SOCIETE DE CONSTRUCTION D'AVIONS DE TOURISM, PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA

(DENNIS JONES, JOHN AND ROSA GEORGE, REAL PARTIES IN INTEREST)

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE SECURITIES AND EXCHANGE COMMISSION AS AMICI CURIAE

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QUESTION PRESENTED

Whether a federal district court, adjudicating a private civil suit against a foreign national subject to the court's jurisdiction, should employ the procedures set forth in the Hague Evidence Convention for discovery of documents and information within the possession of the foreign national but located abroad.

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INTEREST OF AMICI CURIAE

The United States is a party to the Hague Evidence Convention [1] and has a strong interest in promoting international judicial cooperation consistent with domestic law. The Securities and Exchange Commission, the agency charged by Congress with the enforcement of the federal securities laws, has in the past used the Convention's procedures in an effort to obtain evidence abroad and

[1] Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555 *et seq.* (entered into force between the United States and France on Oct. 6, 1974), *reprinted at* Pet. App. 26a-41a.

thus has actual experience with the practical operation of its transnational discovery methods. This Court on three previous occasions has invited the United States to express its views on the question presented. See U.S. Amicus Br., *Anschuetz & Co. GmbH.* v. *Mississippi River Bridge Authority*, No. 85-98, and *Messerschmitt Bolkow Blohm, GmbH.* v. *Walker*, No. 85-99, petitions for cert. pending (U.S. *Anschuetz* Br.); U.S. Amicus Br., *Club Mediterranee, S.A.* v. *Dorin*, appeal dismissed and cert. denied, 469 U.S. 913 (1984) (U.S. *Club Med.* Br.); U.S. Amicus Br., *Volkswagenwerk A.G.* v. *Falzon*, appeal dismissed, 465 U.S. 1014 (1984) (U.S. *Falzon* Br.).

STATEMENT

Petitioners are aircraft-manufacturing corporations organized under the laws of France and owned by the government of that country (Pet. App. 1a). Although petitioners construct their aircraft in France, they advertise and sell them in the United States (*ibid.*). In 1980, one of petitioners' "short take-off and landing" aircraft was involved in a plane crash in Iowa. Respondents Dennis Jones, John George, and Rosa George brought this tort action against petitioners in the United States District Court for the Southern District of Iowa, alleging that they suffered personal injury as a result of defects in the plane (*ibid.*).

Petitioners and respondents both sought discovery, and discovery motions were referred by the parties' consent to a magistrate under 28 U.S.C. 636(c)(1). Respondents filed an initial request for production of documents; this request sought the flight manual, pilot's handbook, performance data and testing records of the airplane involved in the crash (Pet. App. 12a; J.A. A19-A20). Petitioners apparently complied with this initial discovery request, and they in turn propounded interrogatories and requested documents from respondents (Pet. App. 12a). Respondents then filed a further request for production of documents, as well as interrogatories and requests for admissions (J.A. A21-A38). In that second round of discovery, respondents sought inspection reports and design specifications for the aircraft (J.A. A27-A29); requested admissions that petitioners had made certain claims about the aircraft in advertisements published in United States magazines (J.A. A21-A26; A36-A38); and propounded questions about the composition of those advertisements (J.A. A30-A35).

Petitioners declined to comply with the second discovery request and sought a protective order from the magistrate (Pet. App. 12a; J.A. A1-A11). They contended that the responsive information and documents could properly be produced only through the procedures set forth by the Hague Evidence Convention.[2] Petitioners also argued that production by means other than the Convention would violate a French "blocking statute" prohibiting transmittal of evidence for use in foreign judicial proceedings except as provided by international agreement or French law (J.A. A9-A10).[3]

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[2] The Hague Evidence Convention provides three alternative methods for conducting evidence-taking proceedings abroad. Under the first method, a litigant may request the court where the action is pending to transmit a "Letter of Request" to the "Central Authority" in the country where the evidence is located. See arts. 1-2, 23 U.S.T. 2557-2558. The Central Authority, selected by the foreign government, then transmits the request to the appropriate foreign court, which conducts the evidentiary proceeding. See arts. 5-13, 23 U.S.T. 2560-2563. The foreign court, upon request, will conduct the evidentiary proceeding under procedures specified by the requesting court, unless those procedures are incompatible with internal law or impracticable. See art. 9, 23 U.S.T. 2561. Under the second method, the litigant may request that a diplomatic or consular officer of the country where the action is pending take evidence in the foreign country to which he is accredited. See arts. 15-16, 23 U.S.T. 2564-2565. Under the third method, the litigant may request that a specially appointed commissioner take evidence in the foreign country. See art. 17, 23 U.S.T. 2565. The three methods are similar to those identified by Fed. R. Civ. F. 28(b).

[3] The French statute, enacted in 1980, provides (Pet. App. 47a-48a):

> Subject to treaties or international agreements and applicable laws and regulations, it is prohibited for any party to request,

The magistrate denied petitioners' motion and ordered compliance with respondents' discovery request (Pet. App. 11a-25a). The magistrate based his decision primarily upon his "concern with the impediment to discovery which the Hague Evidence Convention places on litigation in American courts and the potential interference with such proceedings which forcing compliance with foreign court procedures would cause" (*id.* at 24a). In response to petitioners' claim that discovery would violate the French blocking statute, the magistrate cited evidence that the statute "ha[s] not been strictly enforced in France" and noted that in any event "a party who is affected by the law may seek a waiver of its provisions from the appropriate French minister" (*id.* at 22a). The magistrate pointed out that the discovery sought—production of documents, responses to requests for admissions, and answers to interrogatories—"does not have to take place in France" and that the requested discovery was "not greatly intrusive or abusive" (*id.* at 25a). He concluded on balance that the "United States' interests are stronger than potential French interests" and ruled that resort to the Hague Convention was not required (*ibid.*).

Petitioners sought review of the magistrate's decision through a petition to the court of appeals for a writ of mandamus. Although the court of appeals agreed to consider the merits of the petition, it declined to grant the relief requested (Pet. App. 1a-10a). The court first concluded that the Hague Convention's procedures have no application to the discovery in question, stating (*id.* at 4a);

> Although a minority of courts have adopted the position advanced by the Petitioners, in our opinion the better rule, which has been adopted by the vast

seek or disclose, in writing, orally or otherwise, economic, commercial, industrial, financial or technical documents or information leading to the constitution of evidence with a view to foreign judicial or administrative proceedings or in connection therewith.

> majority of courts, is that when the district court has jurisdiction over a foreign litigant the Hague Convention does not apply to the production of evidence in that litigant's possession, even though the documents and information sought may physically be located within the territory of a foreign signatory to the Convention.

The court specifically adopted the Fifth Circuit's view that " 'matters preparatory to compliance with discovery orders in the United States, even where the preparatory acts occur in foreign nations, do not constitute discovery in the foreign nation as addressed by the Hague Convention' " (*id.* at 5a, quoting *In re Anschuetz & Co., GmbH.*, 754 F.2d 602, 611 (5th Cir. 1985), petition for cert. pending, No. 85-98). While holding that "the Hague Convention does not apply to the discovery sought in this case," the court suggested that the Convention "will continue to provide useful, if not mandatory, procedures for discovery abroad from foreign nonparties who are not subject to an American court's jurisdiction and compulsory powers" (Pet. App. 5a, 6a).

The court of appeals next considered whether the French blocking statute provides an independent ground for petitioners' objections to compliance with the discovery orders. The court agreed with the magistrate's balancing of the foreign and domestic interests, relying (Pet. App. 9a) on factors set forth in Section 40 of the Restatement of Foreign Relations Law of the United States (1965). The court suggested that petitioners, as corporations owned by the French government, "stand in a most advantageous position" to obtain a waiver of the blocking statute's requirements, and the court opined that petitioners' good faith in seeking a waiver would be relevant in the event the magistrate considered imposing sanctions for noncompliance with the discovery order (Pet. App. 10a).[4]

[4] No question of sanctions under Fed. R. Civ. P. 37 is before this Court at this time.

SUMMARY OF ARGUMENT

The court of appeals erred in holding that the Hague Evidence Convention has no application in the present case. The Convention prescribes optional procedures, preferred by most foreign litigants, for parties to obtain discovery of documents and information located abroad. An American court, faced with objections to traditional American discovery methods on the ground that they would violate a foreign nation's law or clearly articulated policies, should give serious consideration to use of the Convention even though it has the power to require discovery through the traditional means. Principles of international comity should guide a court's decision whether to use the Convention in any particular case.

Comity is a flexible principle and does not require initial resort to the Convention whenever a foreign litigant objects to American discovery procedures. A rigid rule mandating "first use" of the Convention in all cases finds no support in the language or ratification history of the Convention and would fail to respond to the inevitable complexities of transnational discovery disputes. Rather, the question whether to employ the Convention should be based on a case-by-case comity analysis that takes into account the facts and circumstances surrounding the particular discovery request and the foreign objections thereto.

A proper comity analysis must begin with a reasoned evaluation of the domestic and foreign interests. The United States' interest generally will center on its obligation to assure that domestic litigants are afforded adequate opportunities to adjudicate their claims. Foreign interests that may merit accommodation from United States courts include such concerns as preservation of territorial integrity, prevention of abusive evidence-gathering, or policies safeguarding substantive liberty, property, or privacy interests. In determining whether or not to utilize the Convention, the court should consider whether the Convention can provide fair, efficient, and effective discovery, taking into account such factors as

whether the evidence can be obtained through the Convention and the expense, burden, and delays that might result from its use. The United States has a strong interest in avoiding conflict with foreign nations, and American courts should thus be mindful of the need to refrain, when feasible, from ordering discovery that would violate a foreign nation's laws or policies. Because the district court is in the best position to apply a proper comity analysis in the first instance, the decision should be vacated and the case remanded for that purpose.

ARGUMENT

THE COURT OF APPEALS ERRED IN CONCLUDING THAT THE HAGUE EVIDENCE CONVENTION HAS NO APPLICATION TO THE DISCOVERY REQUESTS AT ISSUE HERE, AND THE CASE SHOULD BE REMANDED FOR A DETERMINATION WHETHER RESORT TO THE CONVENTION SHOULD BE REQUIRED PURSUANT TO A PARTICULARIZED COMITY ANALYSIS

The Hague Evidence Convention prescribes procedures by which litigants involved in civil and commercial transnational disputes may obtain evidence from abroad. The Convention was formulated through the Hague Conference on Private International Law[5] and represents an attempt to encourage evidence-gathering methods that are both " 'tolerable' in the State of execution and * * * 'utilizable' in the forum of the State of origin where the action is pending." S. Exec. A, 92d Cong., 2d Sess. 11 (1972). The Convention helps bridge the significant procedural obstacles encountered when litigants seek evidence located in a foreign country that employs a different legal system. See *id.* at VI; S. Exec. Rep. 92-95, 92d Cong., 2d Sess. 1 (1972); *Report of United States Dele-*

[5] The Hague Conference is an international organization that promotes cooperation in the development of uniform rules of private international law. See Reese, *The Hague Conference on Private International Law: Some Observations*, 19 Int'l Law. 881 (1985).

gation to Eleventh Session of Hague Conference on Private International Law, 8 Int'l Legal Materials 785, 806 (1969).

Although the Hague Evidence Convention is a significant attempt to foster international judicial cooperation, its proper interpretation has become the subject of increasing litigation. Foreign defendants, who typically oppose discovery in United States courts, have frequently asserted that the Convention operates as the exclusive and mandatory method by which domestic plaintiffs may obtain discovery abroad. This appears to have been the thrust of petitioners' argument below (see Pet. App. 4a, 12a), although they have since retreated from that position (see Pet. Reply Br. 5-6). Domestic plaintiffs, by contrast, have objected to use of the Convention, maintaining that it is an expensive and ineffective method for conducting discovery. They have urged that the Convention has no application whatsoever when the foreign defendant is subject to the jurisdiction of a United States court and where production of the information will occur in this country. This is the interpretation adopted by the court of appeals below (Pet. App. 4a-7a).

In our view, both of these extreme interpretations are incorrect. As we have previously explained at greater length (see U.S. *Anschuetz* Br. 8-11; U.S. *Club Med.* Br. 3, 7-9; U.S. *Falzon* Br. 4-7), we think it clear that the Convention provides optional, rather than exclusive, methods for obtaining discovery from foreign parties. As a general matter, United States courts have broad authority to demand that foreign nationals subject to their jurisdiction produce evidence located abroad.[6] The

[6] See, *e.g.*, *Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982); *Societe Internationale* v. *Rogers*, 357 U.S. 197, 204-206 (1958); *In re Marc Rich & Co., A.G.*, 707 F.2d 663, 667 (2d Cir.), cert. denied, 463 U.S. 1215 (1983); *United States* v. *First National City Bank*, 396 F.2d 897, 900-901 (2d Cir. 1968); *Federal Maritime Commission* v. *DeSmedt*, 366 F.2d 464, 468-469 (2d Cir.), cert. denied, 385 U.S. 974 (1966); *SEC* v. *Minas de Artemisa S.A.*, 150 F.2d 215, 217 (9th Cir. 1945);

Hague Evidence Convention influences, but does not control, the exercise of that power. The Convention's language, history, and purposes alike indicate that it was not intended to prescribe the exclusive means by which American plaintiffs might obtain foreign evidence (see U.S. *Anschuetz* Br. 8-11). American courts are virtually unanimous in concluding that the Convention's procedures are not exclusive.[7]

Equally erroneous in our view is the court of appeals' conclusion, at the opposite extreme, that "when the dis-

International Society for Krishna Consciousness, Inc. v. *Lee*, 105 F.R.D. 435, 441 (S.D.N.Y. 1984); *In re Uranium Antitrust Litigation*, 480 F. Supp. 1138, 1144-1145 (N.D. Ill. 1979); *Volkswagenwerk, A.G.* v. *Superior Court*, 123 Cal. App. 3d 840, 856-857, 176 Cal. Rptr. 874, 883-884 (1981). See also Onkelinx, *Conflict of International Jurisdiction: Ordering the Production of Documents in Violation of the Law of the Situs*, 64 Nw. U. L. Rev. 487, 502-504 (1969); Smit, *International Aspects of Federal Civil Procedure*, 61 Colum. L. Rev. 1031, 1053-1054 (1961); Note, *Strict Enforcement of Extraterritorial Discovery*, 38 Stan. L. Rev. 841, 843 (1986). Cf. Restatement (Second) of Foreign Relations Law of the United States §§ 39, 40 (1965).

[7] See, *e.g.*, *Societe Nationale Industrielle Aerospatiale* v. *U.S. District Court*, 788 F.2d 1408, 1410-1411 (9th Cir. 1986); *In re Messerschmitt*, 757 F.2d at 731; *In re Anschuetz*, 754 F.2d at 606-614; *Lowrance* v. *Weinig*, 107 F.R.D. 386, 388-389 (W.D. Tenn. 1985); *Work* v. *Bier*, 106 F.R.D. 45, 52-53 (D.D.C. 1985); *Slauenwhite* v. *Bekum Maschinenfabriken, GmbH.*, 104 F.R.D. 616, 618-619 (D. Mass. 1985); *International Society for Krishna Consciousness, Inc.* v. *Lee*, 105 F.R.D. at 444-447; *Compagnie Francaise D'Assurance Pour Le Commerce Exterieur* v. *Phillips Petroleum Co.*, 105 F.R.D. 16, 27-28 (S.D.N.Y. 1984); *Laker Airways, Ltd.* v. *Pan American World Airways*, 103 F.R.D. 42, 48-50 (D.D.C. 1984); *Cooper Industries, Inc.* v. *British Aerospace, Inc.*, 102 F.R.D. 918, 919-920 (S.D.N.Y. 1984); *Graco, Inc.* v. *Kremlin, Inc.*, 101 F.R.D. 503, 519-524 (N.D. Ill. 1984); *Gebr. Eickhoff Maschinenfabrik Und Eisengieberei mbH* v. *Starcher*, 328 S.E.2d 492, 497 (W.Va. 1985); *Pierburg GmbH & Co. KG* v. *Superior Court*, 137 Cal. App. 3d 238, 186 Cal. Rptr. 876, 879-880 (1982). Some foreign commentators continue to urge that the Convention is exclusive. See, *e.g.*, Heck, *U.S. Misinterpretation of the Hague Evidence Convention*, 24 Colum. J. Transnat'l L. 231 (1986). However, we are aware of no reported decisions supporting that position.

trict court has jurisdiction over a foreign litigant the Hague Convention does not apply to the production of evidence in that litigant's possession" (Pet. App. 4a). Nothing in the language or history of the Convention suggests that its procedures were meant to be confined to situations where the *production* of evidence takes place abroad, and to exclude situations where the *gathering* of evidence, or other preparatory steps, are to occur on foreign soil. Neither the United States nor foreign signatories to the Convention have ever subscribed to the interpretation adopted by the court below. And the court of appeals' narrow interpretation would scarcely serve the interests of domestic litigants, for it would render the Convention, an often valuable tool for obtaining information abroad, unavailable and thus useless in the most common discovery contexts.

We believe that the Hague Convention is potentially applicable to discovery requests of the sort involved here and that principles of international comity should guide a court's determination whether the Convention's procedures should be employed in any particular instance. Although resort to the Convention is not mandatory, it offers a promising mechanism for reducing international friction resulting from transnational application of American discovery techniques. American courts should be mindful of the need to refrain, when feasible, from ordering discovery that would violate the laws or clearly articulated policies of a foreign government. Trial judges should thus give serious consideration to use of the Convention where to do so would not unduly infringe upon the interests of the United States or the rights of its litigants.

Although it has increasingly come to be recognized that resort to the Convention should be governed by a comity analysis, there remains considerable disagreement as to how that inquiry should be conducted in practice, and as to what its proper outcome should typically be. In the pages that follow, we outline our view of the proper comity analysis, and suggest factors that may be particularly important in light of the specific discovery requests at issue here.

A. Comity Does Not Require First Use Of The Hague Convention In Every Case Where A Foreign Litigant Objects To American Discovery Procedures

This Court has described the concept of international comity as follows:

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Hilton v. *Guyot*, 159 U.S. 113, 163-164 (1895).[8] When a United States court encounters objections to domestic discovery from a foreign signatory of the Hague Convention, it should analyze the interests of the United States and the foreign country to determine whether the Convention's procedures should be employed. Absent direct guidance from Congress, an individualized comity analysis provides the best—indeed, the only— available method for resolving conflicts between domestic and foreign interests. Properly conducted, a comity analysis gives the district court the necessary flexibility to consider the ~~multitude and~~ various factors that may be relevant in any particular case.

Petitioners seem to agree (Reply Br. 5-6) that resort to the Hague Convention should be governed by principles of comity. They contend, however, that comity principles, as a general rule, "require that resort be made

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[8] See, *e.g.*, *Laker Airways, Ltd.* v. *Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984); *United States* v. *First National Bank*, 699 F.2d 341, 345-347 (7th Cir. 1983); *United States* v. *Vetco, Inc.*, 691 F.2d 1281, 1288-1291 (9th Cir.), cert. denied, 454 U.S. 1098 (1981); *United States* v. *First National City Bank*, 396 F.2d at 901-905. Cf. *Societe Internationale* v. *Rogers*, 357 U.S. 197.

to the Convention in the first instance, at least when the issue is timely raised" (Pet. 16). Because a comity analysis is "so flexible and far reaching," petitioners say, "trial courts need clear guidelines or presumptions to apply" lest their findings be "conclusory and result-oriented" (*id.* at 17). In petitioners' view, "[a] rule ordinarily requiring resort to the Convention in the first instance" is necessary to ensure "that principles of comity are given adequate consideration" (*ibid.*).

We cannot accept petitioners' submission in this respect. The American concept of international comity favors an individualized, case-by-case weighing of domestic and foreign interests, not per se rules of the sort petitioners urge. Neither the Convention itself nor its ratification history supports petitioners' proposed "first use" rule, and such an inflexible rule would prove unworkable in practice given the almost infinite variety of transnational discovery disputes. And because there remain some questions about the Convention's effectiveness as a general matter in producing needed discovery, we believe that a "first use" requirement would be unjustified at this time.

1. The American concept of international comity, from its earliest origins, has eschewed inflexible rules. See *Hilton* v. *Guyot*, 159 U.S. at 164-165.[9] This Court has often stated that comity requires the exercise of judg-

[9] As this Court noted in *Guyot* (159 U.S. at 164-165), Justice Story's *Commentaries on the Conflicts of Law* (first published in 1834) stated that "there is indeed great truth" in the observation

> "that comity is, and ever must be uncertain; that it must necessarily depend on a variety of circumstances which cannot be reduced to any certain rule; that no nation will suffer the laws of another to interfere with her own to the injury of her citizens; that whether they do or not must depend on the condition of the country in which the foreign law is sought to be enforced, the particular nature of her legislation, her policy, and the character of her institutions * * *."

J. Story, *Commentaries on the Conflicts of Law* § 28, at 28-29 (8th ed. 1883) (quoting *Saul* v. *His Creditors*, 5 Mart. (n.s.) 569, 596 (La. 1827)).

ment rather than adherence to mechanical formulae.[10] The lower courts agree that "[s]ince comity varies according to the factual circumstances surrounding each claim for its recognition, the absolute boundaries of the duties it imposes are inherently uncertain." *Lake Airways, Ltd.* v. *Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir 1984) (footnote omitted). "Mechanical or overbroad rules of thumb are of little value; what is required is a careful balancing of the interests involved and a precise understanding of the facts and circumstances of the particular case." *United States* v. *First National City Bank*, 396 F.2d 897, 901 (2d Cir. 1968).

This Court's decision in *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958), specifically recognizes that transnational discovery disputes cannot be resolved through per se rules. A unanimous Court there refused to hold that a foreign company is excused from production of documents whenever foreign law prohibits production, noting that a general rule excusing disclosure would undermine substantive United States interests and encourage evasion of domestic law (357 U.S. at 205-206). The Court noted that discovery under the Federal Rules "is sufficiently flexible to be adapted to the exigencies of particular litigation" and that "[t]he propriety of the use to which it is put depends upon the circumstances of a given case" (*id.* at 206).

[10] Relying in part on comity principles, this Court recently concluded that foreign government instrumentalities established as independent juridical entities should normally be treated as distinct from their sovereigns, but refused to announce a "mechanical formula" for determining when that status should be disregarded. See *First National City Bank* v. *Banco Para el Comercio*, 462 U.S. 611, 626-627, 633 (1983). See also *Banco Nacional* v. *Sabbatino*, 376 U.S. 398, 428 (1964) (refusing to establish "an inflexible or all-encompassing rule" concerning acts of state); *Disconto Gesellschaft* v. *Umbreit*, 208 U.S. 570, 579 (1908) (noting that the *Guyot* decision "shows that how far foreign creditors will be protected and their rights enforced depends upon the circumstances of each case").

2. The fact that this case involves the interpretation of a treaty provides no reason for the Court to depart from its traditional reluctance to replace a discriminating comity analysis with mechanical rules. Petitioners do not contend that the Hague Evidence Convention itself imposes a "first use" requirement, and neither its language nor its ratification history supports mandatory first use. Indeed, such a requirement would be inconsistent with the understanding that the Convention " 'makes no major changes in United States procedure and requires no major changes in United States legislation or rules.' " S. Exec. Rep. 92-25, *supra*, at 5 (quoting Philip Amram, United States representative and rapporteur at the Hague Conference). The lower federal courts, adverting to this ratification history, have generally agreed that the Convention's procedures need not necessarily be exhausted.[11]

A rule dictating mandatory first use of the Convention would also be unworkable in practice. The Convention

[11] The Fifth and Ninth Circuits, like the court of appeals below, have rejected the first-use requirement. *Societe Nationale Industrielle Aerospatiale* v. *U.S. District Court*, 788 F.2d at 1411; *In re Messerschmitt*, 757 F.2d at 731; Pet. App. 7a. Most federal district court decisions have declined to impose that requirement. See, *e.g.*, *Lowrance* v. *Weinig*, 107 F.R.D. at 388-389; *Work* v. *Bier*, 106 F.R.D. at 54-56; *Slauenwhite* v. *Bekum Maschinenfabriken, GmbH.*, 104 F.R.D. at 618-619; *International Society for Krishna Consciousness* v. *Lee*, 105 F.R.D. at 449; *Compagnie Francaise D'Assurance* v. *Phillips Petroleum Co.*, 105 F.R.D. at 32; *Cooper Industries, Inc.* v. *British Aerospace, Inc.*, 102 F.R.D. at 919-920; *Graco, Inc.* v. *Kremlin, Inc.*, 101 F.R.D. at 519-524. However, a few federal district courts, and a somewhat larger number of state courts, have required first resort to the Convention, at least in certain circumstances. See *Laker Airways, Ltd.* v. *Pan American World Airways*, 103 F.R.D. at 51; *Philadelphia Gear Corp.* v. *American Pfauter Corp.*, 100 F.R.D. 58, 60 n.3 (E.D. Pa. 1983); *Gebr. Eickhoff Maschinenfabrik Und Eisengieberei mbH* v. *Starcher*, 328 S.E.2d at 506; *Pierburg GmbH & Co. KG* v. *Superior Court*, 137 Cal. App. 3d at 243-244, 186 Cal. Rptr. at 879-880; *Vincent* v. *Ateliers de la Motobecane S.A.*, 193 N.J. Super. 716, 721-724, 475 A.2d 686, 689-691 (1984); *TH. Goldschmidt A.G.* v. *Smith*, 676 S.W.2d 443, 445 (Tex. Ct. App. 1984).

has been ratified by numerous countries that, in turn, have markedly different legal systems and varying attitudes toward American discovery procedures.[12] Notably, 12 of the 17 signatory states have executed declarations under Article 23 of the Convention restricting, in whole or in part, pretrial discovery of documents.[13] The Convention is potentially available for application in a broad range of civil and commercial litigation—ranging from antitrust actions to ordinary tort suits—and a foreign nation's reaction to a discovery request could well depend in part on the nature of the underlying action. Most important, there remain some questions concerning the Convention's effectiveness as a general matter in producing needed discovery. Under these circumstances, United States courts should have discretion to determine whether the Convention should be utilized in any particular case. See *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 36 (1984) ("The trial court is in the best position to weigh fairly the competing needs and interests of parties affected by discovery. The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders.").

3. The federal government's limited experience with the Convention's procedures also counsels against adoption of an inflexible first-use rule. On four recent occasions, the Securities and Exchange Commission has attempted to employ the Convention's procedures to obtain foreign evidence for use in enforcement actions involving insider trading in violation of the federal securities

[12] Apart from the United States, the Convention is in force in Barbados, Cyprus, Czechoslovakia, Denmark, Finland, France, the Federal Republic of Germany, Israel, Italy, Luxembourg, the Netherlands, Norway, Portugal, Singapore, Sweden, and the United Kingdom.

[13] See 7 *Martindale-Hubbell Law Directory* (pt. VII) at 15-19 (1986); Oxman, *The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Evidence Convention*, 37 U. Miami L. Rev. 733, 771-777 (1983).

laws.[14] The Commission twice employed the Convention's procedures to obtain non-party evidence of insider trading in *SEC* v. *Certain Unknown Purchasers of the Common Stock of, and Call Options for the Common Stock of, Santa Fe International Corp.*, No. 81 Civ. 6553 (WWC) (S.D.N.Y. filed Oct. 26, 1981). See *Securities Exchange Act Release Nos. 9484, 9485*, [1981-1982] Fed. Sec. L. Rep. (CCH) ¶ 98,323 (Oct. 26, 1981). The Commission sought to secure documents and testimony from third-party witnesses residing in England and France. The English request ultimately yielded useful evidence, although the process consumed nine months and entailed the expenditure of over $40,000 in foreign counsel fees.[15] After two and one-half years of litigation in French courts, however, the French request failed to produce the requested testimony.[16]

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[14] The Commission has a particularly keen need to obtain foreign evidence in carrying out its responsibilities for enforcement of federal securities laws in internationalized capital markets. See Fedders, *Policing Internationalized U.S. Capital Markets: Methods to Obtain Evidence Abroad*, 18 Int'l Law. 89 (1984).

[15] The Commission sought evidence from a hotel, a credit card company, and two individuals who had acted as stockbrokers for purchases of Santa Fe securities shortly before the merger announcement. The federal district court issued letters of request to the British Central Authority on July 25, 1983. Upon presentation of the request, an English Master ordered that the evidence be given. The credit card company and hotel complied. However, the two individuals refused to comply, arguing that the Commission's requests were improper and would violate bank secrecy laws. On February 23, 1984, after briefing and four days of oral argument, the English court ordered the two individuals to testify. *In re Evidence (Proceedings in Other Jurisdictions) Act 1975* (Q.B. Feb. 23, 1984) (Drake, J.), *reprinted in* 23 Int'l Legal Materials 511 (1984). The witnesses testified two months later.

[16] The federal district court issued letters of request in May 1983. The French witnesses contested the request. A French tribunal ultimately granted the Commission's request for testimony on December 17, 1985. *In re Testimony of Constandi Nasser*, Trib. Admin. de Paris, 6eme section—2eme chambre, No. 51546/6 (Dec. 17, 1985). This victory proved, however, to be pyrrhic. The witness

The Commission also employed the Hague Convention procedures on two occasions to obtain non-party evidence of insider trading in *SEC* v. *Banca della Svizzera Italiana, et al.*, No. 81 Civ. 1836 (MP) (S.D.N.Y. filed Mar. 27, 1981). The Commission sought documents and testimony from third-party witnesses residing in Italy and Guernsey. In both cases, letters of request issued pursuant to the Convention's procedures failed to provide a significant portion of the requested evidence.[17] The Italian proceedings consumed two months and $20,000 in court costs and foreign counsel fees. The Guernsey proceedings

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refused to testify and the French court, in response, imposed a minor fine. The *Santa Fe* litigation was settled on February 26, 1986.

[17] The Italian request, issued by the federal court on Aug. 9, 1985, was directed to an SEC-registered broker-dealer in Milan and to certain individuals affiliated with him. The Court of Appeals of Milan, by decree dated September 10, 1985, authorized the letter of request and directed its execution by October 2, 1985. The Magistrate's Court of Milan took testimony from the witnesses but declined to compel production of documents in light of Italy's declaration, under Article 23 of the Convention, that it will not execute pretrial requests for documents. *Statement on the Examination of Witnesses as Requested by a Foreign Letter Rogatory* (Pret. Milano, Italy Oct. 2, 1985).

The Guernsey request, issued by the federal court on September 20, 1985, was directed to a Guernsey banking institution and concerned testimony and documents relating to the identity of the beneficial owners of an account utilized to execute certain questionable transactions. A Guernsey court ordered two witnesses to appear and to comply with the letter rogatory. On October 7, 1985, the witnesses moved in Guernsey to set aside the order, contending that the requested discovery was forbidden by Guernsey law. On March 11, 1986, the Deputy Bailiff of Guernsey denied the Commission's request for assistance on the ground that the testimony sought was a "search for defendants" and thus "fishing in nature." *In re Evidence (Proceedings in Other Jurisdictions) Act 1975 (Guernsey) Order 1980* (Stat. Inst. 1980 No. 1956). A Guernsey appeals court dismissed the Commission's appeal from that order as moot following a decision of a United States court resolving other aspects of the case in the Commission's favor. See *SEC* v. *Tome*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 92,762 (S.D.N.Y. June 3, 1986).

consumed eight months and over $50,000 in foreign counsel fees.

The Commission's experience with Hague Convention procedures, which has not been entirely positive, may well be atypical. The Commission is a government enforcement agency, whereas requests for discovery under the Convention are more commonly made by private parties. The Commission has resorted to the Convention only four times, each request being directed to a non-party rather than to a party before the court, and each request being made in the context of a fraud suit rather than the more typical negligence or contract action. The State Department informs us that private plaintiffs in the latter sorts of litigation have found resort to the Convention more successful. The Commission's experience, however, does buttress our belief that adoption of any blanket presumption mandating "first use" of the Convention in all cases would be unwise. A number of courts have expressed concern that resort to the Convention might impose unjustified hardships on domestic litigants—frequently individual tort plaintiffs—who may lack the legal and financial resources needed to pursue their requests in foreign tribunals.[18]

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[18] See, *e.g.*, *Pain* v. *United Technologies Corp.*, 637 F.2d 775, 788-790 (D.C. Cir. 1980), cert. denied, 454 U.S. 1128 (1981) ("there can be little doubt that the cost to the litigants of employing such procedures would be exceedingly high"); *Gebr. Eickhoff Maschinenfabrik, mbH.* v. *Starcher*, 328 S.E. 2d at 506 (suggesting that there may be difficulties inherent in resort to the Convention); *Work* v. *Bier*, 106 F.R.D. 45, 54-55 (D.D.C. 1985) (discussing inadequacies in German procedures under the Convention, and the problem of obtaining evidence in admissible form); *International Society for Krishna Consciousness* v. *Lee*, 105 F.R.D. at 450 (suggesting that Convention procedures are "quite slow and costly"); see also Struve, *Discovery from Foreign Parties in Civil Cases before U.S. Courts*, 16 N.Y.U. J. Int'l L. & Pol. 1101, 1111 (1984) ("by comparison with the means of discovery provided by the Federal Rules of Civil Procedure, the Hague Convention represents a mode of discovery which is significantly less certain, less effective, more costly and more burdensome"). A rule mandating presumptive first use of the Convention could also impose tactical burdens on domestic litigants,

In sum, we see no need or justification for a blanket presumption requiring domestic plaintiffs to resort to the Hague Convention before employing the domestic discovery methods made available by federal or state rules. Instead, the question whether to employ the Convention's procedures should be based upon an individualized comity analysis that takes into account the particular facts and circumstances surrounding the discovery at issue. The ultimate determination, like the disposition of other discovery matters, should remain within the considered discretion of this Nation's trial courts, which are "in the best position to weigh fairly the competing needs and interests of parties affected by discovery." *Seattle Times Co.*, 467 U.S. at 36.[19]

B. The Decision Below Should Be Vacated And The Case Should Be Remanded For The Application Of A Proper Comity Analysis

The United States has repeatedly maintained that American courts should give serious consideration to the use of the Hague Evidence Convention whenever a foreign litigant from a signatory nation (where the evidence is located) timely and clearly articulates his country's objections to the use of American discovery methods (U.S. *Anchuetz* Br. 11-12; U.S. *Club Med.* Br. 9-11). A court

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requiring them to pursue discovery through possibly cumbersome procedures, while the foreign litigant could take full advantage of this Nation's liberal discovery methods. The resulting lack of mutuality in discovery could alter litigants' judgments about settlement and trial strategy and could otherwise impair the domestic judicial process. See *Hickman* v. *Taylor*, 329 U.S. 495, 507 (1947) ("Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation."); see also 4 J. Moore, *Moore's Federal Practice* ¶ 26.52 (2d ed. 1984). Notably, the United States freely permits litigants in foreign tribunals to use its liberal discovery methods when they seek evidence located in this country. See 28 U.S.C. 1782.

[19] See, *e.g.*, *Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. at 707-709 (discovery sanctions); *Herbert* v. *Lando*, 441 U.S. 153, 176-177 (1979) (relevance determinations); *Societe Internationale* v. *Rogers*, 357 U.S. at 213 (discovery sanctions).

should carefully consider the domestic and foreign interests and provide a reasoned explanation of its decision to conduct discovery through the Hague Convention, through American discovery procedures, or through a combination of those devices. In the present case, petitioners contended that the discovery sought by respondents would be objectionable to the Republic of France. Faced with that contention, the court of appeals erred in failing to apply comity principles in reviewing the magistrate's decision to forgo use of the Hague Convention. This Court, following its normal practice, should vacate the court of appeals' decision and remand the case for application of the correct legal standard. See, *e.g.*, *Anderson* v. *Liberty Lobby, Inc.*, No. 84-1602 (June 25, 1986), slip op. 14. Cf. *Schlagenhauf* v. *Holder*, 379 U.S. 104, 111-112 (1964).

Courts and commentators have formulated various tests to guide comity analyses under international law.[20] Ulti-

[20] Section 40 of the Restatement (Second) of Foreign Relations Law of the United States (1965) suggests consideration of five factors to resolve international conflicts of law: (a) the "vital interests" of each state; (b) the resulting hardships to the affected party; (c) the extent to which conduct takes place in the foreign state; (d) the nationality of the person; and (e) the extent to which either state may be able to achieve compliance with its rules. In the past, courts have often looked to Section 40 for guidance in international discovery disputes. See, *e.g.*, *Compagnie Francaise D'Assurance* v. *Phillips Petroleum Co.*, 105 F.R.D. at 29-32.

In addition, the American Law Institute's revised Restatement includes a specific provision dealing with international conflicts arising from foreign discovery. See Restatement (Revised) of Foreign Relations Law of the United States § 437 (Tent. Draft No. 7, 1986) (approved May 14, 1986). The provisions state (*id.* § 437 (1)(c)) that United States courts

> should take into account the importance to the * * * litigation of the documents or other information requested; the degree of specificity of the request; whether the information originated in the United States; the availability of alternative means of securing the information; and the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.

Section 437 and its accompanying comments have proven controversial, particularly insofar as they suggest that foreign discovery should in all instances proceed by court order (see Section 437 comment (a) & reporter's note 2) and that discovery should be limited to "directly relevant" information (*ibid.*). See, *e.g.*, Struve, *supra*, 16 N.Y.U. J. Int'l L. & Pol. at 1105-1107 (stating that "in view of the lack of prior authority supporting the Reporter's position, it is questionable whether the restrictions upon the scope of discovery contained in [Section 437] accurately represent the law as it is or the law as it should be"). The Justice Department has informed the ALI of its objections to several aspects of the proposed revision.

mately, however, "what is required is careful balancing of the interests involved and a precise understanding of the facts and circumstances of the particular case." *United States* v. *First National City Bank*, 396 F.2d at 901. In our view, the essential elements of any comity analysis must include (1) a reasoned evaluation of the domestic and foreign interests and (2) an attempt to accommodate, to the extent feasible, legitimate foreign concerns.

1. a. The central domestic interest is generally the same in any international discovery dispute. The United States has a fundamental obligation to assure that domestic litigants are afforded adequate opportunities to adjudicate their claims. This Court has often recognized "the importance of ensuring that potential litigants have unimpeded access to the courts." *Seattle Times*, 467 U.S. at 36 n.22. See *California Motor Tranpsort Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510 (1972); *NAACP* v. *Button*, 371 U.S. 415, 429-431 (1963); see also *Mitsubishi Motors Corp.* v. *Solem Chrysler-Plymouth, Inc.*, No. 83-1569 (July 2, 1985), slip op. 26-27 (Stevens, J., dissenting). And it is well settled that a United States litigant is generally entitled to adjudicate his claim in accordance with the laws of the local forum. See Restatement (Second) of Conflicts of Laws §§ 122, 127 (1971).

American jurisprudence provides that an important element of the litigant's right to judicial access is the opportunity to discover the pertinent facts surrounding his claim. That element finds explicit recognition in the discovery provisions of the Federal Rules of Civil Procedure. Those provisions are central to the conduct of federal judicial proceedings. The "pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules." *Hickman* v. *Taylor*, 329 U.S. 495, 500 (1947). Discovery is the preferred method by which parties may narrow the basic issues and ascertain the existence of facts germane to those issues, ensuring that "civil trials in the federal courts no longer need be carried on in the dark" (*id.* at 501).

The federal discovery provisions place a high premium on disclosure. "Under the Rules, the only express limitations are that the information sought is not privileged, and is relevant to the subject matter of the pending action. Thus, the Rules often allow extensive intrusion into the affairs of both litigants and third parties." *Seattle Times*, 467 U.S. at 30 (footnote omitted). "But the discovery provisions, like all of the Federal Rules of Civil Procedure, are subject to the injunction of Rule 1 that they 'be construed to secure the just, *speedy*, and *inexpensive* determination of every action.'" *Herbert* v. *Lando*, 441 U.S. 153, 177 (1979) (emphasis supplied by the Court). Thus, the ultimate goal of the Federal Rules is efficient as well as effective discovery.

b. The precise nature of the foreign interests at stake in discovery controversies has not been well articulated by the courts or by foreign litigants in the past. Foreign parties have typically objected to American discovery methods on the ground that such devices violate their home country's "judicial sovereignty." But such assertions often have an abstract quality and do little, in and of themselves, to elucidate the substantive foreign interests at stake. Courts should understand that assertions of "judicial sovereignty" often incorporate legitimate notions of territorial integrity—a reluctance to permit

foreign litigants to invade one's borders, literally or figuratively, for the purpose of seizing evidence. Objections based on "judicial sovereignty" are often advanced by litigants from nations that employ the civil rather than the common law, nations in which evidence-gathering is usually conducted by judicial officers rather than by private parties. In that context, assertions of "judicial sovereignty" may reflect an understandable reluctance to forfeit the moderating effects of judicial supervision and to expose one's citizens to unpredictable and potentially abusive evidentiary demands. On the other hand, assertions of "judicial sovereignty" may simply illustrate a foreign nation's desire to protect its nationals from liability, or reflect a preference for its own mode of dispute resolution instead of ours.

In our view, assertions of foreign "judicial sovereignty" must be evaluated in light of the established American principle (see note 6, *supra*) that a United States court may order a foreign national, properly subject to the court's jurisdiction, to produce evidence located abroad. As a general matter, it is not unreasonable in principle for this Nation's courts to subject foreign corporations doing business here to the same judicial procedures that are applied to domestic corporations. In the instant case, for example, petitioners, corporations owned by the Republic of France, have elected to conduct operations in the United States and compete in the domestic market. Petitioners have advertised and sold their aircraft in the United States and presumably have profited from doing so. One of petitioners' aircraft has now unfortunately crashed in Iowa, and respondents seek to recover for their loss. Under these circumstances, an abstract claim of "judicial sovereignty" cannot equate to a right—indeed, it would be an extraordinary privilege—to have all of the benefits of access to American markets, yet to be free from the burdens that American judicial procedures generally impose.[21]

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[21] This Nation's courts, of course, may exercise jurisdiction over a foreign party only if the party's contacts with the forum are

Foreign objections to American discovery requests should also be greeted with caution where it is alleged that compliance would violate a foreign law in the nature of a "blocking" statute. Blocking statutes, of which the French law involved here (Pet. App. 47a-48a, 57a) is an extreme (and not necessarily typical) example, generally forbid foreign citizens to produce evidence abroad. The French blocking statute prohibits French nationals from disclosing information only when it will be used against them in a judicial or administrative proceeding, permitting them to divulge information voluntarily to any entity but a court or an administrative body. A number of commentators have interpreted the French statute to express little more than simple hostility to American law.[22] In our view, objections founded merely on hostility

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sufficient "to make it reasonable and just" for the domestic forum to adjudicate the dispute. *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U.S. 437, 445 (1952). Once jurisdiction over a foreign party has properly attached, the court may require that party to produce evidence regardless whether it is located in this country or abroad. But the United States is "not the only nation to enforce its laws extraterritorially." Toms, *The French Response to the Extraterritorial Application of United States Antitrust Laws*, 15 Int'l Law. 585, n.1 (1981) (citing examples). While foreign governments often urge that *any* claim for production of evidence violates international law, it is not clear whether they themselves would decline to order production of evidence located abroad. A German commentator has suggested that "European courts make a similar claim, although this claim is hidden behind a different configuration of the relevant legal institutions and norms." P. Schlosser, *Der Justizkonflikt zwischen den USA und Europa* 44 (1985) (English Summary). "One can conclude," he adds, "that there is no rule in international public law which limits the authority of national courts and agencies to require the cooperation of foreign parties in discovery and to impose sanctions for refusals in so far as this also can be done in a similar situation to a domestic party" (*id.* at 45).

[22] The French blocking statute has been widely interpreted to evidence hostility both to this Nation's antitrust law and to its judicial procedures. See, *e.g.*, Toms, *supra*, 15 Int'l Law. at 586; Herzog, *The 1980 French Law on Documents and Information*, 75 Am. J. Int'l L. 382 (1981). One commentator, examining the legislative report that accompanied the French blocking statute, agreed that the law "was 'never expected or intended to be enforced against

to American law should be approached with some skepticism in any proper comity analysis.

On the other hand, foreign nations will often have more specific and concrete interests that merit accommodation from United States courts. Foreign laws may provide particular protection to various liberty, property, and privacy interests, according business secrets or confidential communications (for example) special immunity from disclosure. Foreign nations may also provide testimonial privileges that are generally absent in this Nation's courts. In these instances, a foreign government may have understandable concerns that unbridled American discovery will infringe substantive protections provided to its citizens.

As we have suggested above, moreover, foreign assertions of "judicial sovereignty"—to the extent that they embody legitimate concerns about territorial integrity and prevention of evidential extravagance—may also merit accommodation from United States courts. In weighing such claims, the nature and scope of the requested discovery will often be of central concern. Ordering that a foreign citizen be deposed on a foreign nation's soil obviously works a greater affront to that nation's "territorial integrity" than (to take an example from the instant case) requiring a foreign corporation doing business here to make admissions that it has published advertisements in American magazines. See J.A. A21-A26. Indeed, this Nation's courts, sensitive to the territorial sovereignty of foreign nations, have generally required use of the Hague Convention where domestic

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French subjects but was intended rather to provide them with tactical weapons and bargaining chips in foreign courts.' " Note, *supra*, 38 Stan. L. Rev. at 864 (quoting *Adidas (Canada) Ltd.* v. *S.S. Seatrain Bennington*, No. 80 Civ. 1922 (S.D.N.Y. May 30, 1984)). We have lodged an English translation of the French legislative report, obtained from the Stanford Law Review (see 38 Stan. L. Rev. at 846 n.22), with the Clerk of this Court. See also *Graco*, 101 F.R.D. at 514 (noting that the foreign litigant had failed to identify a single case in which the French blocking statute's sanctions had been imposed).

litigants seek the involuntary deposition of a party abroad or the production of evidence from persons outside the court's jurisdiction. See, *e.g.*, *Anschuetz*, 754 F.2d at 615. And when a foreign litigant expresses his nation's concern to prevent excessive and abusive evidence-gathering, the nature and scope of the discovery sought will again be of critical importance.

We leave it to foreign litigants and their governments to elaborate their interests in appropriate cases. The important point, in our view, is that they clearly identify the specific interest at stake and explain how that interest would be adversely affected by the particular discovery sought. It is certainly conceivable that petitioners could identify more particularized substantive interests than those illuminated in the prior proceedings. On remand, the foreign interests in this case should be reexamined.

2. Once a foreign litigant has elaborated his nation's concerns, the American court should attempt, to the extent feasible, to accommodate those concerns in the discovery process. The chief goal of the comity process is, of course, to prevent international friction. The use of the Hague Evidence Convention can provide an effective means of achieving that goal. However, as a central component of its comity analysis, the court must critically consider whether or not the Convention can provide fair, efficient, and effective discovery, taking into account such factors as whether the evidence can be obtained through the Convention mechanisms and the expense, burden, and delays that might result from its use.

Resort to the Convention will inevitably entail some measure of added expense and inconvenience, whether in the form of translator's costs, foreign legal fees, or the inability to obtain evidence in precisely the form that one could secure it in domestic discovery.[23] If these transac-

[23] As Judge Wilkey explained in *Pain* v. *United Technologies Corp.*, 637 F.2d at 788-790 (footnotes omitted; emphasis in original):

> Although the Hague Evidence Convention provides a mechanism whereby the recipient nation's executing authority is required to assist an American court with such compulsory

tion costs are minor relative to the scope of the underlying litigation and the volume of the evidence sought, they provide little basis for forgoing use of the Convention. On the other hand, particular foreign nations may have erected, formally or informally, more substantial barriers to successful use of the Convention. Resort to the Convention's procedures may be demonstrably more cumbersome in some countries than in others. Most significantly, some foreign nations may have chosen, as France has done, to make a reservation under Article 23 of the Convention, refusing to accept letters of request "issued for the purpose of obtaining pre-trial discovery of documents" (art. 23, 23 U.S.T. 2568).[24] Although petitioners contend (Pet. 17 n.36) that France's Article 23 reservation "was not intended to preclude United States litigants from obtaining necessary evidence abroad, but rather to prevent discovery of a 'fishing expedition' nature," we think that foreign litigants bear the burden of demonstrating that such reservations do not mean what they say. A foreign nation's insistence on retention of an absolute reservation under Article 23 necessarily raises serious ques-

> force as its own courts can exercise in a pretrial evidentiary situation, numerous exceptions to the international obligation exist, which potentially bar this device from being executed at all. For example, foreign judicial cooperation may be withheld altogether if the discovery assistance is deemed prejudicial to state sovereignty.
>
> Furthermore, even when discovery abroad is available, the *breadth* of evidence ordinarily expected from a full-fledged American-style deposition might be constricted for any number of reasons: the foreign state's own procedures might limit or foreclose cross-examination, full participation of counsel might not be allowed, or a verbatim record might not result, thus limiting admissibility of the testimony in an American court. The scope of foreign privilege might prove broader under the letter rogatory procedure than under either local law or American law, and in some cases, official translators might be required for each piece of paper involved.

[24] See 7 *Martindale-Hubbell Law Directory* (pt. VII) at 16 (1986); Borel & Boyd, *Opportunities for and Obstacles to Obtaining Evidence in France for Use in Litigation in the United States*, 13 Int'l Law. 35, 43-44 (1979).

tions about the likely effectiveness of discovery requests directed to it under the Convention.[25]

In our view, the foreign litigant is best situated to inform the court of his country's procedures with respect to the Convention. He need not demonstrate that the Convention will function as effectively or as efficiently as the Federal Rules. But he must satisfy the court that, under the circumstances, resort to the Convention is consistent with the "just, speedy, and inexpensive" determination of the suit (Fed. R. Civ. P. 1). The district court should not require resort to the Convention unless it has reasonable prospects of producing effective and efficient discovery under the facts and circumstances of the particular case.

3. We believe that the trial court, with its expertise in discovery matters, is best situated to conduct the kind of particularized comity analysis that we have outlined, and that the case should be remanded for that purpose. Although we express no view on the proper outcome on remand, we believe that courts in general should give careful consideration to use of the Convention in appropriate cases. The Convention has major positive attributes—it provides a nonexclusive discovery mechanism that is free from foreign objections and it can yield evidence that is not otherwise obtainable. Although domestic litigants may complain that resort to the Convention will entail added expense and delay, a court can allay such concerns by careful supervision and wise exercise of its discretion. A court may require the foreign defendant, for example, to pledge his full cooperation with the Convention proceedings abroad. Under recent amendments to the Federal Rules, moreover, a district court generally must provide a timetable for discovery. See Fed. R. Civ. P. 16(b). Thus, a court might specify Convention procedures as an initial method for discovery, subject to reasonable time constraints. If those procedures fail to produce effective and efficient discovery, or lead to abusive

[25] We understand that Germany is now considering domestic regulations that would limit the scope of its Article 23 reservation.

practices, the court can return to traditional American discovery procedures and, if necessary, impose sanctions (see *e.g.*, Fed. R. Civ. P. 11).[26]

Quite apart from the Hague Evidence Convention, moreover, federal courts have substantial power to reduce international friction resulting from overly broad discovery requests. "There have been repeated expressions of concern about undue and uncontrolled discovery, and voices from this Court have joined the chorus." *Herbert* v. *Lando*, 441 U.S. 153, 176 (1979). But Federal Rule 26(b) "emphasizes the complete control that the court has over the discovery process" (8 C. Wright & A. Miller, *Federal Practice and Procedure, Civil* § 2036, at 267 (1970) (footnote omitted)), and trial courts have broad authority to enter orders protecting *both* domestic *and* foreign litigants from discovery abuse. As this Court has stated (*Herbert*, 441 U.S. at 177):

> [T]he requirement of Rule 26(b)(1) that the material sought in discovery be "relevant" should be firmly applied, and the district courts should not neglect their power to restrict discovery where "justice requires [protection for] a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . . ." Rule 26(c). With this authority at hand, judges should not hesitate to exercise appropriate control over the discovery process.

Moreover, because "pretrial depositions and interrogatories are not public components of a civil trial" (*Seattle*

[26] We strongly disagree with the court of appeals' suggestion that " 'the greatest insult to a civil law country's sovereignty would be for American courts to invoke the foreign country's judicial aid merely as a first resort, subject to the eventual override of their rulings under the Federal Rules of Civil Procedure' " (Pet. App. 7a (quoting *Anschuetz*, 754 F.2d at 613)). We believe that a foreign court would welcome the opportunity to inform its American counterpart of the foreign perspective on discovery issues, even if the American court might ultimately disagree. Indeed, the Hague Convention provides a valuable means for domestic and foreign courts to engage in constructive discourse. That dialogue will provide the domestic and foreign courts with invaluable and authoritative insight into each others' laws.

Times, 467 U.S. at 33), litigants may have reasonable expectations that sensitive discovery materials will be shielded from public disclosure. See generally Marcus, *Myth and Reality in Protective Order Litigation*, 69 Cornell L. Rev. 1 (1983).

Finally, we note that a United States court, in the exercise of comity, may wish to exercise a particularly active supervisory role in litigation involving foreign parties. Foreign litigants are accustomed to close judicial scrutiny of evidence-gathering in their own courts. See, *e.g.*, Langbein, *The German Advantage in Civil Procedure*, 52 U. Chi. L. Rev. 823 (1985). Enhanced judicial participation in the discovery process will provide additional assurance to foreign litigants of the fairness of American judicial proceedings.

CONCLUSION

The court of appeals' decision should be vacated and the case remanded for further proceedings.

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AUGUST 1986

☆ U. S. GOVERNMENT PRINTING OFFICE: 1986 491507 20307